A **HOLIDAY VILLAGES OF MALAYSIA SDN BHD**

v.

MENTERI SUMBER MANUSIA & ANOR

B COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: C-01-51-2008]
C 15 APRIL 2009

LABOUR LAW: *Trade union - Recognition - 1st respondent accorded recognition to 2nd respondent union to represent the appellant's employees other than those employed in the managerial, executive, confidential and*
D *security capacity - Whether 1st respondent had sufficiently given his reasons for his decision - Whether decision is one which any decision maker similarly circumstanced would have made*

ADMINISTRATIVE LAW: *Judicial review - Application for - Certiorari - Whether issue of "procedural impropriety" applicable here -*
E *Whether procedural steps taken by 1st respondent in coming to decision to accord recognition to 2nd respondent to represent all the appellant's employees, other than those employed in the managerial, executive, confidential and security capacity, not in compliance with legislative*
F *instruments expressly provided under the relevant laws - Whether 1st respondent acted within scope of powers conferred upon him under Industrial Relations Act 1967 and the relevant regulations*

The appellant, a company which owns and operate an integrated holiday village known as Club Mediterranean Cherating Resort
G Village, employed permanent and seasonal employees. On 10 September 1997, the 2nd respondent union claimed recognition from the appellant to represent all the appellant's employees except those in the managerial, executive, confidential and security capacity with effect from 10 September 1997. As there was no feedback from
H the appellant, the 2nd respondent duly informed the Director General of Industrial Relations (DGIR) about the claim. The DGIR requested the appellant and the 2nd respondent respectively to submit a list of its employees as of 10 September 1997 and those who were members of the union, respectively. The Director-General
I of Trade Unions (DGTU) by a letter dated 21 January 1998

informed both parties that membership verification will be conducted on 26 February 1998. By a letter dated 12 March 1998, the DGTU informed the DGIR that the membership verification shows 59.32% of the appellant's employees are members of the union at the relevant agreed cut-off date *ie*, 10 September 1997 (DGTU's findings). The DGIR informed both parties of the DGTU's findings and the 1st respondent accorded recognition to the 2nd respondent. The appellant protested against the DGTU's findings. These findings were upheld both by the 1st respondent as well as by the High Court. Dissatisfied with the 1st respondent's decision, the appellant applied to the Kuantan High Court for judicial review and for on order of *certiorari* to quash the aforesaid decision. The High Court dismissed the appellant's application and the appellant duly appealed to the Court of Appeal.

Held (dismissing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The steps or process as laid down in the relevant laws (Industrial Relations Act 1967 (IR Act), Industrial Relations Regulations, Trade Unions Act 1959 and Trade Unions Regulations 1959) have been strictly followed by the DGIR, DGTU as well as the 1st respondent before coming to the conclusion that 59.32% of the appellant's employees were members of the 2nd respondent as at the cut-off date 10 September 1997 and before the 1st respondent gave his decision to accord recognition to the 2nd respondent. The appellant has failed to show that the 1st respondent and his officers have acted outside the scope of powers conferred upon him under the IR Act and the relevant regulations. The 1st respondent's decision thus cannot be said to be "illegal". (para 25)

(2) The court agrees with the learned judge's findings that the 1st respondent had sufficiently given his reasons for his decision to accord recognition to the 2nd respondent. These reasons were found in the 1st respondent's affidavit and were properly cited by the learned judge in her grounds of judgment. There is sufficient evidence for the 1st respondent to consider and to come to his decision on 1 June 1998. The decision is one which any decision maker similarly circumstanced would have made. It is not so outrageous or in defiance of logic. It is not

tainted with any "Wednesbury unreasonableness". Therefore the 1st respondent's decision cannot be considered as 'irrational'. (para 30)

(3) The appellant has also failed to show that the decision of the 1st respondent was "irrational or procedurally improper" so as to enable the High Court to exercise its discretion for judicial review. The learned judge had not exercised her discretion on a wrong principle; and there has been no miscarriage of justice resulting in her exercise of discretion. The appellant has failed to show any valid or cogent grounds upon which the High Court can exercise its discretionary power of judicial review and quash the 1st respondent's decision. The High Court judge was right in dismissing the appellant's application with costs. Accordingly the appeal is dismissed with costs. (para 34)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, sebuah syarikat yang memiliki dan mengendalikan sebuah perkampongan resort percutian bersepadu dikenali sebagai Club Mediterranean Cherating Resort Village, telah menggaji pekerja-pekerja tetap dan juga sementara. Pada 10 September 1997, responden kedua kesatuan menuntut pengiktirafan dari perayu bagi mewakili kesemua pekerja-pekerja perayu berkuatkuasa 10 September 1997 kecuali mereka-mereka yang dari golongan pengurusan, eksekutif, confidential dan keselamatan. Oleh kerana tiada maklum balas diterima dari perayu, responden kedua telah memberitahu Ketua Pengarah Perhubungan Perusahaan (KPPP) mengenai tuntutan. KPPP meminta perayu dan juga responden kedua untuk mengemukakan senarai pekerja-pekerja perayu setakat 10 September 1997 dan senarai mereka yang menjadi ahli kesatuan. Kemudian, melalui surat bertarikh 21 Januari 1998, Ketua Pengarah Kesatuan Sekerja (KPKS) memberitahu kedua-dua pihak bahawa pengesahan keahlian akan dilakukan pada 26 Februari 1998. Melalui surat bertarikh 12 Mac 1998, KPKS memberitahu KPPP bahawa pengesahan keahlian menunjukkan 59.32% dari pekerja-pekerja perayu adalah ahli kesatuan setakat tarikh cut-off yang dipersetujui, iaitu 10 September 1997 (dapatan KPKS). KPPP kemudian telah memberitahu pihak-pihak mengenai dapatan KPKS dan responden pertama telah memberikan pengiktirafan kepada responden kedua. Perayu membantah terhadap dapatan KPKS. Dapatan tersebut bagaimanapun telah disahkan oleh responden pertama dan juga

Mahkamah Tinggi. Tidak berpuashati dengan keputusan responden pertama, perayu merayu ke Mahkamah Tinggi Kuantan untuk semakan kehakiman dan untuk perintah *certiorari* bagi membatalkan keputusan berkenaan. Mahkamah Tinggi menolak permohonan perayu dan perayu merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Langkah-langkah atau proses seperti yang dihuraikan di dalam undang-undang yang relevan (Akta Perhubungan Perusahaan 1967 (Akta PP), Peraturan-Peraturan Perhubungan Perusahaan, Akta Kesatuan Sekerja 1959 dan Peraturan-Peraturan Kesatuan Sekerja 1959) telah diikuti dengan ketatnya oleh KPPP, KPKS dan juga responden pertama sebelum membuat rumusan bahawa 59.32% dari pekerja-pekerja perayu adalah ahli responden kedua setakat tarikh cut-off 10 September 1997 dan sebelum responden pertama memberikan keputusannya untuk memberi pengiktirafan kepada responden kedua. Perayu gagal menunjukkan bahawa responden pertama dan pegawai-pegawainya telah bertindak di luar batasan kuasa-kuasa yang diberikan kepadanya di bawah Akta PP dan Peraturan-Peraturan yang berkaitan. Keputusan responden pertama dengan itu tidak boleh dikatakan "tak sah".

(2) Mahkamah bersetuju dengan dapatan yang arif hakim bahawa responden pertama telah memberikan alasan-alasan yang mencukupi dalam memberikan pengiktirafan kepada responden kedua. Alasan-alasannya boleh dilihat dalam afidavit responden pertama dan alasan telah dicatatkan dengan teraturnya oleh yang arif hakim dalam alasan penghakimannya. Terdapat keterangan yang mencukupi untuk dipertimbang oleh responden pertama bagi membolehkannya mencapai keputusan pada 1 Jun 1998. Keputusan itu adalah satu keputusan yang akan dibuat oleh mana-mana pembuat keputusan yang berada dalam halkeadaan yang serupa. Ia bukanlah sesuatu yang sangat outrageous atau bertentangan dengan logik. Ia juga tidak dicemari oleh "Wednesbury unreasonableness". Oleh itu keputusan responden pertama tidak boleh dianggap sebagai 'tidak rasional'.

(3) Perayu juga gagal menunjukkan bahawa keputusan responden pertama adalah "irrational or procedurally improper" bagi membolehkan Mahkamah Tinggi melaksanakan budibicaranya

untuk semakan kehakiman. Yang arif hakim tidaklah melaksanakan budibicaranya atas prinsip-prinsip yang salah; dan tidak berlaku sebarang salahlaksana keadilan dalam pelaksanaan budibicara oleh beliau. Perayu gagal menunjukkan apa-apa alasan yang sah atau menyakinkan yang mewajarkan Mahkamah Tinggi untuk melaksanakan budibicaranya membuat semakan kehakiman dan membatalkan keputusan responden pertama. Hakim Mahkamah Tinggi betul apabila menolak permohonan perayu dengan kos. Oleh itu, rayuan adalah ditolak dengan kos.

Case(s) referred to:
Charles Osenton & Co v. Johnston [1942] AC 130 ***(refd)***
Council of Civil Service Union & Ors v. Minister for the Civil Service [1985] 4 All ER 374 AC ***(refd)***
Evans v. Bartlam [1937] AC 473 ***(refd)***
Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***
National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour & Manpower [1980] 2 MLJ 189 ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***
Reg v. Entry Clearance Officer, Bombay, Ex p Amin [1983] 2 AC 818 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 9(2), (3)(b), (4A), (4B), (5), (6)
Trade Unions Regulations 1959, regs. 63, 64, 65, 66

For the appellant - Dato' DP Naban (Elizabeth Loo Mui Yuen with him); M/s Lee Hishammuddin Allen & Gledhill
For the 1st respondent - Effendi Nazila Abdullah SFC; AG's Chambers
For the 2nd respondent - B Lobo; M/s Lobo & Assocs

[Appeal from High Court, Kuantan; Originating Motion No: 25-9-1998]

Reported by Susheila Sreedharan

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by Holiday Villages of Malaysia Sdn Bhd (the appellant) against the whole of the learned High Court judge's decision given on 6 March 2004 dismissing its application for judicial review and an order of *certiorari* to quash the 1st respondent's decision made on 1 June 1998 to accord recognition to

the 2nd respondent to represent all of the appellant's employees, other than those employed in the managerial, executive, confidential and security capacity.

Factual Background

[2] The relevant facts as enumerated in the learned judge's grounds of judgment can be summarised as follows:

(a) the appellant, a company which owns and operates an integrated holiday village known as Club Mediterranean Cherating Resort Village, employed two categories of employees, namely, permanent and seasonal employees. The seasonal employees are employed for a maximum period of ten months from February to November in a year (whose employment will cease when the resort closes for business during the "monsoon period" (late November to January) affecting the east costs of West Malaysia. The seasonal employees may or may not be employed thereafter, depending on various factors including whether the employees wish to be re-employed by the appellant;

(b) on 10 September 1997, the 2nd respondent claimed recognition from the appellant to represent all the appellant's employees except those in the managerial, executive, confidential and security capacity with effect from 10 September 1997;

(c) since there was no feedback from the appellant, the 2nd respondent on 10 October 1997, informed the Director General of Industrial Relations (DGIR) about the claim;

(d) the DGIR by a letter dated 25 October 1997, requested the appellant to submit a list of its employees as of 10 September 1997 and the 2nd respondent to submit a list of employees who were members of the union as of the same date;

(e) the 2nd respondent by a letter dated 7 November 1997 complained that the appellant has refused to continue the employment of 80 employees;

(f) the 2nd respondent by a letter dated 26 January 1998 informed the DGIR that the contract of employment of 86.5% of their members had come to an end around the period between 2 November 1997 to 8 November 1997 and only 13.5% continued their employment;

(g) the Director-General of Trade Union (DGTU) by a letter dated 21 January 1998 informed both parties that membership verification will be conducted on 26 February 1998;

(h) by a letter dated 12 March 1998, DGTU informed the DGIR that the membership verification shows 59.32% of employees are members of the union; and

(i) by a letter dated 9 April 1998, the DGIR informed both parties of the result and accordingly the 1st respondent accorded recognition to the 2nd respondent.

[3] Those facts are not in dispute as are evident from the various affidavits filed by the parties in the High Court.

[4] The appellant protested against the findings of the DGTU that there was at least 59.32% of the appellant's employees were members of the 2nd respondent at the relevant agreed cut off date ie, 10 September 1997. These findings were upheld both by the 1st respondent as well as by the High Court.

[5] According to the appellant, its investigation of the union membership showed less than 10% of the appellant's permanent employees were members of the 2nd respondent; and it was impossible that 50% of the appellant's permanent and seasonal employees were members of the 2nd respondent.

[6] Dissatisfied with the 1st respondent's decision the appellant applied to the Kuantan High Court for judicial review and for on order of *certiorari* to quash the aforesaid decision by way of a notice of motion dated 16 July 1998.

[7] On 6 March 2008 the High Court dismissed the appellant's application. Subsequently the appellant proceeded to file a notice of appeal to the Court of Appeal against the aforesaid High Court's decision.

The Role Of Court In Judicial Review

[8] It is trite principle that the court does not act as an appeal court in cases of judicial review. Judicial review is concerned not with merits of a decision but with the manner in which the decision was made. Judicial review is entirely different from an

ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer. (This was clearly explained by Lord Fraser of Tullybelton in the case of *Reg v. Entry Clearance Officer, Bombay, Ex. p. Amin* [1983] 2 AC 818. The same principle was also applied and followed in *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; and *National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour & Manpower* [1980] 2 MLJ 189).

[9] In *Minister of Labour, Malaysia v. Lie Seng Fatt (supra)*, the Supreme Court stressed that as long as the administrative authority concerned had exercised the discretion without improper motive, the exercise of discretion must not be interfered with, unless it can be shown that the particular authority had misdirected itself, had taken into irrelevant considerations or had not taken into consideration relevant matters or that the decision militates against the object of the statute.

[10] According to Lord Diplock in the case of *Council of Civil Service Union & Ors. v. Minister for the Civil Service* [1985] 4 All ER 374 AC, one can conveniently classify the grounds upon which administrative decision is subject to control by judicial review in three categories, namely: illegality, irrationality and procedural impropriety.

[11] "Illegality" refers to a situation where the authority concerned has been guilty of an error of law in its action ie, purporting to exercise a power it does not have. "Irrationality" refers to a situation where the authority exercises a power in so unreasonable a manner ("Wednesbury unreasonableness"). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Lastly, "procedural impropriety" refers to a situation where there is a failure on the part of the authority to observe procedural rules that are expressly laid down in the legislature instruments by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.

[12] In the present case, the issues of "illegality" and "irrationality" have not been established at all. There is no evidence to substantiate the two issues. The court shall now consider whether the issue of "procedural impropriety" is applicable or not to the facts of the present case.

[13] To establish "procedural impropriety" the appellant must show that the procedural steps taken by the 1st respondent in coming to his decision on 1 June 1998 to accord recognition to the 2nd respondent to represent all the appellant's employees, other than those employed in the managerial, executive, confidential and security capacity, were not in compliance with the legislative instruments expressly provided under the relevant laws.

[14] The relevant provisions for the recognition of a trade union are provided for under s. 9 of the Industrial Relations Act 1967 (Act 177) – (the IR Act).

[15] Section 9(2) of the IR Act provides for the trade union to serve on the employer in writing a claim for recognition. Under s. 9(3) an employer who has been served with such a claim may after 21 days from service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded notify the trade union concerned in writing the grounds for not according recognition; or

(c) apply in writing to the Director General of Industrial Relations (DGIR) to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union.

[16] If the trade union received a notification under s. 9(3)(b) of the IR Act or where the employer concerned fails to comply with s. 9(3) of the IR Act the trade union may under s. 9(4) report to the DGIR in writing.

[17] Section 9(4A) of the IR Act provides that upon receiving an application under s. 9(3) or a report under s. 9(4) the DGIR is empowered to take steps or make inquiries to resolve the matter. In order to perform his function under s. 9(4A) the DGIR is vested with the powers to require the trade union, the employer or trade union of employees to furnish any information he deems necessary.

[18] The DGIR is also given the discretion under s. 9(4B) of the IR Act to refer to the Director-General of Trade Union (DGTU) for the DGTU's decision on any question of the competence of the trade union to represent any workmen in respect of whom recognition is sought.

[19] If the DGIR cannot resolve the matter pursuant to s. 9(4A) of the IR Act he shall notify the Minister.

[20] The Minister is required by s. 9(5) of the IR Act to give his decision either to accord recognition or otherwise.

[21] In a situation where a trade union has served a claim for recognition, the DGIR may request the DGTU to carry out a membership check in a manner prescribed by reg. 63, 64, 65 and 66 of the Trade Unions Regulations 1959 (TU Regulations). The purpose is to ascertain the percentage of workmen in respect of whom recognition is being sought; who are members of the union making the claim.

[22] The DGTU may in writing notify the trade union making a claim for recognition that a membership check would be conducted either by membership verification or by secret ballot. A copy of such notification shall be sent to the employer (reg. 63 of the TU Regulations).

[23] Both the employer and the trade union are to assist the DGTU with information as he may require to enable the DGTU to conduct the membership check (reg. 64 of the TU Regulations).

[24] Regulation 65 of the TU Regulations prescribes the formula to ascertain the percentage of membership by way of membership verification based on the total number of valid members (as at the date of the claim). The DGTU shall notify the DGIR the result of the membership check (reg. 66 of the TU Regulations).

[25] After going through all the relevant affidavits filed as well as the grounds of judgment of the learned judge, this court is satisfied that the steps or process as laid down in the relevant laws (IR Act, IR Regulations, TU Act and TU Regulations) have been strictly followed by the DGIR, DGTU as well as the 1st respondent before coming to the conclusion that 59.32% of the appellant's

employees were members of the 2nd respondent as at the cut-off date 10 September 1997 and before the 1st respondent gave his decision to accord recognition to the 2nd respondent.

[26] The crux of the appellant's appeal is that seasonal employees should be excluded from the verification exercise. But in its own letters to the 1st respondent (before the impugned decision) the appellant wanted both permanent and seasonal employees to be included in the verification exercise. The learned judge noted this and held it was therefore a non-issue. Therefore the "main issue" was correctly held by the learned judge to be a "non issue" based on the appellant's own letters to the 1st respondent.

[27] In this appeal before this court, the learned counsel for the appellant argued that the 1st respondent had failed to give reasons in coming to his decision to accord recognition to the 2nd respondent; thus the said decision is fundamentally flawed and should be quashed.

[28] This court agrees with the findings of the learned judge (in her grounds of judgment) that the 1st respondent had sufficiently given his reasons for his decision to accord recognition to the 2nd respondent. These reasons were found in paras. 6, 7, 9, 10, 13, 14 and 15 of the 1st respondent's affidavit and were properly cited by the learned judge at p. 24 of her grounds of judgment, and read as follows:

> As to giving of reasons for his decision to accord recognition, this can be found in paragraphs 6, 7, 9, 10, 13, 14 and 15 of the 1st Respondent's affidavit. The 1st Respondent has taken into account the letter of complaint from the 2nd Respondent that 80 employees of the applicant had their services terminated as from 6.11.1997 in violation of section 10(2) and (3) of IR Act which made it an offence for an employer to terminate the services of its employees once a claim for recognition is filed; the letter dated 16.12.1997 from the applicant informing that a majority of its seasonal employees had left from 2.11.1997 – 8.11.1997 and the applicant's support for a membership verification exercise to be done; the Forms B and C forwarded by the applicant and 2nd Respondent listing their employees and members respectively and the result of the verification exercise and the manner in calculating the percentage by the DGTU. The 1st Respondent too has stated clearly and equivocally that he has taken both seasonal and

> permanent employees into account even though a majority of them had left the applicant's service after November 1997 since these employees are as at 10.9.1997, ie, the date recognition was sought still the employees of the applicant.

[29] The learned counsel for the appellant also argued that in coming to his decision without giving any reasons to support it, the 1st respondent seemed to be acting mechanically and/or not directing his mind to the relevant considerations, by adopting in toto the recommendations of the DGIR and DGTU.

[30] In view of the reasons given by the 1st respondent in paras 6, 7, 9, 10, 13, 14 and 15 of his affidavit and in view of the fact that this court had agreed to the findings of the learned judge on this matter, this court cannot accept the said argument put forward by the learned counsel for the appellant. There is sufficient evidence for the 1st respondent to consider and to come to his decision on 1 June 1998. The 1st respondent decision is one which any decision maker similarly circumstanced would have made. It is not so outrageous or in defiance of logic. In other words, it is not tainted with any "Wednesbury unreasonableness". Therefore the said decision by the 1st respondent cannot be considered as 'irrational'.

[31] The principles upon which this court will act in reviewing the discretion exercised by the High Court are well settled. There is a presumption that the learned judge has rightly exercised her discretion. The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle or that there has been miscarriage of justice.

(See: *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; *Charles Osenton & Co. v. Johnston* [1942] AC 130, and *Evans v. Bartlam* [1937] AC 473).

[32] In coming to his decision to accord recognition to the 2nd respondent, the 1st respondent was acting on his powers under s. 9(5) of the IR Act. Section 9(6) of the IR Act clearly stipulates that:

> A decision of the Minister under subsections (1D) or (5) shall be final and shall not be questioned in any Court.

In view of these ouster provisions, the 1st respondent's decision can only be quashed on jurisdictional grounds but not on merits. Therefore in the present appeal, this court will not interfere on the merits of the 1st respondent's decision.

Conclusion

[33] On the above considerations, this court is satisfied that the appellant has failed to show that the 1st respondent and his officers have acted outside the scope of powers conferred upon him under the IR Act (Act 177) and the relevant regulations. In fact the processes as laid down in s. 9 of the IR Act and the relevant regulations have been strictly followed. Therefore the 1st respondent's decision cannot be said to be "illegal".

[34] The appellant has also failed to show that the decision of the 1st respondent was "irrational or procedurally improper" so as to enable the High Court to exercise its discretion for judicial review. The learned judge had not exercised her discretion on a wrong principle; and that there has been no miscarriage of justice resulting in her exercise of the discretion.

[35] The appellant has failed to show any valid or cogent grounds upon which the High Court can exercise its discretionary power of judicial review and to quash the decision of the 1st respondent. The learned High Court judge was right in dismissing the appellant's application with costs.

[36] Therefore, this court unanimously holds that the present appeal is dismissed with costs. Deposit to the account of taxed costs. The decision of the learned High Court judge is affirmed.